(1)

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ELISHA D. HACK, JEREMY A. HERSHMAN,
BATSHEVA GREER, and LISA B. FRIEDMAN,

Petitioners,

v.

THE PRESIDENT AND FELLOWS OF YALE COLLEGE
d/b/a YALE CORPORATION and YALE UNIVERSITY,
RICHARD H. BRODHEAD and BETTY TRACHTENBERG,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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120 pp

QUESTION PRESENTED

Whether the Fair Housing Act's prohibition against discrimination on account of religion and the First Amendment's Free Exercise Clause bar Yale College from requiring devout and observant Orthodox Jewish students to reside in co-educational dormitories in violation of their religious principles.

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The majority and dissenting opinions of the court of appeals (Pet. App. 1a - 49a) are reported at 237 F.3d 81. The opinion of the district court (Pet. App. 50a - 78a) is reported at 16 F. Supp. 2d 183.

JURISDICTION

The decision of the court of appeals was issued on December 28, 2000. A timely petition for rehearing and rehearing en banc was denied on February 9, 2001 (Pet. App. 79a - 80a). On May 2, 2001, Justice Ginsburg extended the time for filing a petition for a writ of certiorari to and including July 9, 2001. The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

STATEMENT

1. Introduction

Elisha D. Hack, Jeremy A. Hershman, Batsheva Greer, and Lisa B. Friedman were freshmen and sophomores at Yale College in 1997. The students are also devout and observant Orthodox Jews.

Yale has a rule that it purports to apply inflexibly requiring all college freshmen and sophomores to reside in co-educational dormitories. The petitioners *cannot* reside in these dormitories, however, because to do so would conflict with their religious principles and duties.

The petitioners contended that Yale's refusal either to exempt them from its purportedly across-the-board residence rule or to accommodate their religious beliefs within the dormitories is illegal because the rule is discriminatorily enforced against students who have *religious* objections to co-educational housing. Yale excuses everyone who is over 21 years of age from the

residence rule, as well as anyone who is married, whether or not the student lives off campus with his or her spouse. Until very recently, any Yale student whose family lived in New Haven was also exempted. Petitioners alleged that Yale also grants *ad hoc* exemptions for reasons other than religion.

Yale contends, and the district court agreed, that Yale is free to discriminate against students with religious objections to co-educational housing because it is a "private" college. This argument, if sustained, would enable Yale to exclude *all* students of the Jewish faith from Yale College simply because they are Jewish, or to prohibit the practice of Catholicism or Islam on campus. Would Yale be constitutionally permitted to require students with religious dietary restrictions to dine in communal cafeterias?

We acknowledge that the United States Constitution does not apply to religious discrimination by schools that are truly private. But we believe that the Constitution does forbid an institution like Yale -- a perpetual fixture of Connecticut's educational landscape that was created by Connecticut law to carry out a governmental function to provide higher education and that is enshrined in Connecticut's Constitution and is governed by a board on which the Governor and Lieutenant Governor of Connecticut sit *ex officio* -- to engage in religious discrimination or to administer rules that deny to religious observers the same consideration given non-observers.

2. The Students' Complaint

The plaintiffs are devout Orthodox Jews whose observance requires strict adherence to a code of sexual modesty. This code forbids, for example, touching members of the opposite sex other than one's immediate relatives or spouse. It also forbids living in a situation in which a person would have regular or repeated exposure to members of the opposite sex who are either undressed or dressed immodestly (Amended Complaint ¶ 57).

The common areas of Yale's residential colleges, including the bathrooms, are easily accessible to members of both sexes (Amended Complaint ¶ 53). Yale has no "parietal rules" against room visits -- at any time of the day or night -- by members of the opposite sex, or against sexual activity and immodesty in its dormitories. *Ibid.*

Each of the students, after he or she was admitted to Yale but before enrolling, requested an exemption from the mandatory housing policy (Amended Complaint ¶¶ 59, 63-65). Each student informed Yale of his or her religious obligations as an Orthodox Jew and of the fact that he or she could not, consistent with Orthodox Judaism, live in those dormitories (Amended Complaint ¶¶ 57, 59-60, 63-65). Given Yale's published assurances that it did not discriminate on the basis of religion, and the fact that students in the past had been granted exemptions from the housing policy and permitted to live in housing other than the co-educational residence-hall dormitories for other reasons, the students had reason to believe, at the time they accepted Yale's offer of admission, that their religious beliefs would be respected.

The students' requests were denied by Yale, and they were directed to live in the co-educational residence halls (Amended Complaint ¶¶ 61, 63-65). The students refused to disregard their religious obligations. They arranged for off-campus housing. Threatened with expulsion unless they would also pay for dormitory rooms, the students did, in fact, pay for both on-campus and off-campus housing -- allowing their dormitory rooms to remain vacant.

The students then filed an action in the United States District Court for the District of Connecticut. Their Amended Complaint alleged violations of federal civil-rights laws and other statutes. The students contended, *inter alia*, that (1) Yale is liable under 42 U.S.C. § 1983 for violating the students' constitutional rights to religious freedom, freedom of association, privacy, due process, and equal protection (Amended Complaint ¶¶ 4, 69-96, 133-138), and that (2) Yale has discriminated on the basis of religion in the provision of housing in violation of the Fair Housing Act, 42 U.S.C. § 3604 (Amended Complaint ¶¶5, 97-99).

3. The District Court Ruling

Yale filed a motion to dismiss the students' Amended Complaint. It refused the students' request for voluntary discovery and moved to prevent the students from conducting any discovery pending resolution of the motion to dismiss. No discovery was conducted pending the district court's decision on that motion. Almost six months after Yale filed its motion, the district court denied Yale's motion to stay discovery. The parties then negotiated and submitted a discovery plan pursuant to

Fed. R. Civ. P. 26(f). Eight days after approving the plan, the district court, without hearing oral argument, dismissed the students' Amended Complaint in its entirety. *See* Pet. App. 50a - 78a.

4. The Court of Appeals Decision

The court of appeals affirmed the dismissal of the complaint. The panel was unanimous in rejecting the Section 1983 claim on the grounds that Yale was not a "state actor" under *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), because less than a majority of its governing board is appointed by the government. As for the Fair Housing claim, the court of appeals divided 2-to-1, with visiting District Judge Moran stating in dissent that Yale's policy "makes housing effectively unavailable to Orthodox Jews, while the terms of that policy impose an additional financial burden on the basis of the plaintiffs' religion." Pet. App. 22a. Judge Moran concluded that "the necessary components of a disparate-impact claim are surely present in the complaint." *Id.*

The majority held that "[b]ecause plaintiffs seek exclusion from housing and not inclusion, they do not state an FHA claim." Pet. App. 18a. The majority also concluded that the complaint failed to allege discriminatory intent and that there were inadequate allegations for a disparate-impact claim. Pet. App. 19a - 20a.

REASONS FOR GRANTING THE WRIT

I.

DEVOUT MEMBERS OF A RELIGIOUS MINORITY SHOULD BE ACCORDED THE SAME BENEFIT OF DISPARATE-IMPACT HOUSING LAW AS OTHER CLASSES PROTECTED BY ANTI-DISCRIMINATION LEGISLATION

Although Yale's mandatory co-educational dormitory policy plainly made college housing inaccessible to devoutly Orthodox Jewish students, the majority below rejected the disparate-impact housing claim on grounds that would not have been approved if the plaintiffs had belonged to some other protected class. The treatment of the petitioners verified the recent observation of Rabbi Marc Gellman that "the last acceptable prejudice in America" is "the prejudice against those who take their faith seriously." M. Gellman, "Civil Rights and the Sacred Truth," Civil Rights Journal 11, 14 (Fall 1997).

To prove this point, one need only compare the narrow rejectionist attitude of the majority below with the much more expansive reading of "disparate-impact" principles by a unanimous New York Court of Appeals in the very recently decided case of *Levin v. Yeshiva University*, 2001 NY Int. 89 (July 2, 2001), which is reproduced at Pet. App. 81a -103a. In *Levin*, the class that was allegedly harmed by a university's priorities in assigning its housing units to married couples consisted of lesbians and gay men. The New York Court of Appeals held that although Yeshiva's policy was not facially discriminatory, the plaintiffs had

alleged enough to warrant discovery and a trial on a disparate-impact theory.

The New York state court relied on the same line of judicial decisions, beginning with *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and continuing through *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), that was canvassed by the dissent below and that forms the basis for any disparate-impact analysis. The application of that doctrine to housing under the federal civil rights law has been the subject of differing approaches in different Circuits. Compare *Metropolitan Housing Developing Corp. v. Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), with *Resident Advisory Board v. Rizzo*, 564 F.2d 126 (3d Cir. 1977). See Pet. App. 32a - 36a. The view of the majority below, that the absence of an allegation of discriminatory intent on the part of Yale diminishes the disparate-impact claim (Pet. App. 19a), also conflicts with the recent First Circuit decision in *Langlois v. Abington Housing Authority*, 207 F.3d 43, 49-50 (1st Cir. 2000).

This case should be heard and decided by this Court in order to determine whether the claims of religious minorities under the disparate-impact application of the Fair Housing Act is equal to that of other classes protected by the civil rights laws.

II.

YALE UNIVERSITY IS A STATE INSTRUMENTALITY THAT MAY NOT DISCRIMINATE ON THE BASIS OF RELIGION

This case raises an important question concerning the legal privilege to engage in invidious discrimination by an educational institution that has been established, funded and permanently preserved by State law and is required by state law to have the Governor and Lieutenant Governor on its governing board. The decision of the court below conflicts with the rationale of *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995), in which Amtrak -- declared by federal statute not to be "an agency or establishment of the United States Government" (45 U.S.C. § 541) -- was held to be a federal agency because it was created by legislative action in order to further governmental objectives and was operated by a governing board a majority of whose members were nominated by the President from a limited group of qualified nominees.

Yale has *not* been declared by statute not to be "an agency or establishment" of the government. It was created by Connecticut law, financed initially with state funds, designed to carry out governmental duties, and is a permanent fixture in Connecticut by reason of a special provision in the Connecticut constitution. See Connecticut Constitution, Article VIII, § 3 ("The charter of Yale College . . . is hereby confirmed."). The Governor and Lieutenant Governor of Connecticut are, by state law, *ex officio* members of Yale's governing

board. This is a smaller number of governmentally selected representatives than are members of Amtrak's board, but it necessarily results in greater governmental influence and the appearance of more governmental involvement in the policies of Yale than the designation of a majority of nominees from the private sector to Amtrak's board. If Amtrak's board had fewer presidential nominees on its board but was required by federal law to have the President and Vice-President as board members, that would surely have strengthened this Court's conclusion that Amtrak is an agency of the federal government. It follows, therefore, that -- contrary to the ruling of the court below -- Yale should be deemed a state actor and governed by constitutional principles on questions of racial and religious discrimination because of its history, its constitutional status, and the participation of Connecticut's Governor and Lieutenant Governor in its governance.

The petitioners should have been afforded an opportunity to prove their allegation that Yale had treated their requests for religious accommodation differently than other students' requests for accommodations based on secular concerns. As recently as *Good News Club v. Milford Central School District*, 121 S. Ct. 2039 (2001), this Court condemned governmental discrimination against religious institutions. This case presents a similar instance of discrimination against religion via the rejection of eminently reasonable requests by devout students based on religious principles.

CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,

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[*] Counsel who represented the petitioners in the lower courts is unable to do so in this Court because of a conflict growing out of his recent association with a firm that represents the respondents.